

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al.,

Plaintiffs,

- against -

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652813/2012 E

Hon. Andrea Masley

JAMS No. 1425026035

Referee Hon. Michael H. Dolinger

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

- against -

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 E

Hon. Andrea Masley

JAMS No. 1425026035

Referee Hon. Michael H. Dolinger

~~Proposed~~ PROTECTIVE ORDER

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This matter being before the Court on the NFL Policyholders' Motion for Protective Order, dated August 21, 2018, and related documents, submissions, and oral argument held on November 27, 2018, and further to the Referee's Memorandum & Order dated February 26, 2019 and issued on February 28, 2019, the Court hereby finds as follows:

1. To facilitate the confidential and secure exchange of information outside of the litigation setting, the NFL Policyholders¹ entered into confidentiality agreements (the "CAs") with the Insurers² other than Westport (the "CA Insurers") governing the provision by the NFL

¹ The NFL Policyholders are the National Football League and NFL Properties LLC.

² The Insurers for purposes of this Order are TIG Insurance Company, North River Insurance Company, U.S. Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Pacific Indemnity Company, Century Indemnity Company, Federal Insurance Company, Great Northern Insurance Company, ACE American Insurance Company, Illinois Union Insurance Company, Vigilant Insurance Company, Westchester Fire Insurance Company, Allstate Insurance Company,

Policyholders of certain documents and other information they chose to share with those Insurers.

2. Information shared by the NFL Policyholders with the CA Insurers pursuant to the CAs is subject to treatment as Confidential Information ("CI"), Confidential Defense Invoice Information ("CDII"), or Confidential Defense Strategy Information ("CDSI"), in accordance with the terms of those agreements.

NOW THEREFORE, upon good cause having been shown, it is hereby:

ORDERED that the Motion is granted in part and denied in part; and it is further

ORDERED that materials exchanged pursuant to one or more CAs may be produced in discovery in this litigation by and to the NFL Policyholders and the Insurers, provided that such information is designated as "Confidential Information" or "Attorneys' Eyes Only Information" under the Stipulation and Order for the Production and Exchange of Confidential Information, which was so ordered by the Court on May 22, 2013, Dkt. No. 311 in the above-captioned case *Alterra America Insurance Co., et al. v. National Football League, et al.*, Index No. 652813/2012, and provided that such production is consistent with the other terms of this order; and it is further

ORDERED that the NFL Policyholders and the Insurers will not assert that the production or use in this litigation of any CI, CDII, and CDSI that is or was provided under a CA constitutes a waiver of any of the NFL Policyholders' rights or privileges with respect to any such information or any other information; provided, however, that while an Insurer may not

American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, Continental Casualty Company, Continental Insurance Company, Munich Reinsurance America, Inc., Bedivere Insurance Company, XL Insurance America, Inc., XL Select Insurance Company, and Westport Insurance Company ("Westport"). Several other insurers entered into comparable agreements with the NFL Policyholders but are not named as parties because they have since settled with the NFL Policyholders or have been placed in liquidation.

assert that the provision of such information under a CA, the production of such information in this litigation, or the use of CI or CDII in this litigation results in a waiver of any privilege or protection, such Insurer is free to argue, with respect to CDSI only, that the NFL Policyholders' [affirmative] use of CDSI in this litigation should result in a waiver ⁸ ~~because it is afflicted with~~ MD

MD ~~disabling unfairness~~ that the NFL Policyholders have withheld from the Insurers equivalent information that is favorable to the Insurers, and the NFL Policyholders are thus using the privilege as both a sword and a shield⁹ and it is further MD

ORDERED that CDII produced in this litigation shall be used by the NFL Policyholders and Insurers solely for the purpose of (i) establishing or contesting the reasonableness or necessity of defense costs claimed by the NFL Policyholders and (ii) litigating whether or not an Insurer or Insurers is/are obligated to provide reimbursement for such fees and costs; provided, however, that such use limitations shall not apply to information that the NFL Policyholders would have been obligated to produce to the Insurers in discovery in this litigation (regardless of whether the information had been shared with any Insurer under any CA) because of a stipulation by the NFL Policyholders or a ruling determining that the materials containing the information were never attorney-client privileged, work product, or otherwise protected from discovery; and it is further

ORDERED that CDSI produced in this litigation shall be used by the NFL Policyholders and Insurers solely for the purpose of establishing or contesting the reasonableness of the underlying defense and/or settlement; provided, however, that such use limitations shall not apply to information that the NFL Policyholders would have been obligated to produce to the Insurers in discovery in this litigation (regardless of whether the information had been shared with any Insurer under any CA) because of a stipulation by the NFL Policyholders or a ruling

determining that the materials containing the information were never attorney-client privileged, work product, or otherwise protected from discovery, or to information that has been ruled to be the subject of the waiver described in and pursuant to the proviso in the third ordering paragraph of this Order; and it is further

ORDERED that Westport is fully subject to this order ~~and~~ ^{and} bound by the same terms and conditions with respect to CI, CDIL, and CDSI that apply to the other Insurers.

Dated: This 27th day of March, 2019


Hon. Michael H. Dolinger, Referee